BEFORE THE SINGLE BENCH: ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A.No.49(ET) of 2013-14

(Arising out of the order of the learned JCST, Bhubaneswar Range, Bhubaneswar in Appeal No.AA.108221211000108, disposed of on 31.10.2012)

P r e s e n t: **Shri Subrat Mohanty, 2nd Judicial Member.**

State of Odisha, represented by the Commissioner of Sales Tax, Odisha, Cuttack. ... Appellant

- V e r s u s -

M/s. Alok Enterprisers, Plot No.230, Goutam Nagar, BBSR. ... Respondent

For the Appellant ... Mr.S.K.Pradhan, Addl. S.C.(CT).
For the Respondent ... None.

Date of hearing: 12.07.2018 * * * Date of Order: 12.07.2018

O R D E R

This second appeal is preferred by the Revenue against the order of the first appellate authority passed in first appeal case No.AA.108221211000108 dated 31.10.2012 challenging thereby reduction of penalty under Section-9-C(5) limited to 20% as illegal.

2. The moot question raised before this Tribunal by way of this second appeal preferred by the State is whether the first appellate authority was wrong in imposing penalty under Section 9-C(5) limiting it to 20%.

3. The assessee-dealer was subjected to assessment under Secion-9-C of the OET Act for the assessment period 1.4.2006 to 31.09.2011. On the basis of audit visit report with the allegations

that non-payment of ET on purchase of textile fabrics and readymade garments to the tune of Rs.14,97,667.05 and unaccounted for purchase of Rs.53,710.00. The assessing authority on confrontation of the allegations to the dealer determined the interstate purchases from registered dealers from unregistered dealers including the freight charges and then determined the GTO and TTO of the dealer. In ultimate analysis, he found the dealer was liable to pay entry tax at Rs.1,85,348.00. Adjusting the tax already paid with return and at the checkgates the balance tax due on the dealer was calculated to Rs.30,942.00. Twice of the balance tax due calculated at Rs.61,884.00 was imposed as penalty as per Section-9-C(5) of the OET Act.

4. The dealer being aggrieved with such demand of tax and penalty preferred first appeal wherein and whereby the first appellate authority on examination of the books of accounts and documents on being produced by the dealer determining the escaped turnover/ purchase suppression at Rs.16,500.00 in place of Rs.53,710.00. But thereafter on determination of GTO and TTO, he re-determined the tax liability of the dealer calculated at Rs.1,84,604.00. Adjusting the tax already paid at checkgates and with return the balance tax due was re-determined at Rs.30,198.00. Then he imposed penalty at Rs.6,040.00 i.e. 20% of tax due. Thus, the tax liability became reduced to Rs.36,238.00 in place of Rs.92,826.00 as raised by the assessing authority.

5. When the matter stood thus, the State has challenged the impugned order on the plea like, the first appellate authority has no jurisdiction to limit the penalty under Section-9-C(5) to the extent of 20% only.

The appeal was heard without cross objection and setting the dealer ex-parte as well, for his absence in the hearing.

At the outset, it is pertinent to mention here that on perusal of the orders of both the fora below it is found, the first

appellate authority had taken the tax paid at checkgates to the tune of Rs.21,250.00 instead of Rs.24,550.00 as accepted by the dealer. The orders of both the fora below do not reveal how it was calculated at Rs.24,550.00 by the assessing officer or Rs.21,250.00 by the first appellate authority. However, this aspect is not challenge by either sides and this being the question of fact it is presumed that first appellate authority is correct since it had the occasion to see the books of accounts and the connected documents of the dealer.

Coming to the disputed question raised by the State i.e. penalty it is revealed that, the first appellate authority taking cue from the ratio laid down by the **Hon'ble Supreme Court in Shree Krishna Electricals Vrs. State of Tamil Nadu and Others reported in (2009) 23 VST 249** has held that, since the dealer had disclosed the details of purchase but denied to avail exemption explain, he should be imposed with penalty at 20%. The provision under Section-9-C(5) of the OET Act reads as under:

" Without prejudice to any penalty or interest that may have been levied under any provision of this Act, an amount equal to twice the amount of tax assessed under sub-section (3) or (4) shall be imposed by way of penalty in respect of any assessment completed under the said sub-sections."

The provision above does not contemplate any discretionary jurisdiction of the authority to limit the penalty to 20% or any percentage other than twice of the tax due. Penalty may be imposed or may nor be but, once the authority imposed penalty it must be at two times of the tax due. This Tribunal failed to understand and appreciate how and on which basis the first appellate authority could reduce the penalty to 20%. It is nothing but at the sweet whim of the first appellate authority the penalty has been reduced. It has no sanction under law. As such, the imposition of penalty at 20% by the first appellate authority declared as illegal and not in accordance to the mandate of the provision

under Section 9-C(5) of the OET Act. In consequence thereof, it is held that the matter should be remitted back to the first appellate authority to consider whether penalty should be imposed or not but it is made clear that the once the authority is under opinion that penalty should be imposed then it must be an amount equal to twice of the tax assessed under sub-Section-3 or 4 of Section-9-C of the OET Act. Accordingly, it is ordered.

The appeal by the State is allowed. The matter is remitted back to the first appellate authority to consider and determine the question like whether in the fact and circumstances of the case, the dealer is liable to pay penalty, as per observation here in above. The whole exercise should be completed within a period of four months.

Dictated and Corrected by me,

(Subrat Mohanty)
Judicial Member-II

(Subrat Mohanty)
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